

¹ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, rehearing denied (May 8, 2007).

In a decision filed April 4, 2008, the Court of Appeals affirmed in part, reversed in part and remanded the case to the Board. The Court of Appeals determined in pertinent part:

We conclude that the *Casco* decision applies to all workers compensation cases pending when *Casco* was decided. Thus Myers' award must be calculated pursuant to the analysis set forth in *Casco*. Because such analysis may require further findings of fact, the case is remanded to the Board for further proceedings.²

After the Petition for Review in this case was denied, the Board asked the parties how they wished to proceed. The claimant requested that the matter be remanded to the ALJ for further proceedings and the respondent argued it would be more expedient for the issues to be determined by the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

As previously noted, the Board issued its decision in this case on March 15, 2007. *Casco* was decided after the Board issued its order. In *Casco*, the Kansas Supreme Court had occasion to consider the appropriate method for calculating compensation for bilateral injuries, an issue that up until that point, had been well settled. Until *Casco*, bilateral or parallel injuries that resulted in permanent impairment were computed as a whole body impairment pursuant to K.S.A. 44-510e. But the *Casco* decision concluded that the longstanding analysis was wrong. In *Casco* it was stated:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination

² *Myers v. Lincoln Center*, 39 Kan. App. 2d 372, 379, 180 P.3d 584 rev. denied (2008).

thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.³

The parties litigated this claim in reliance upon the then existing application of the law that if claimant suffered bilateral carpal tunnel injuries she would be compensated pursuant to K.S.A. 44-510e. It was determined that claimant's bilateral carpal tunnel syndrome was work-related. And the evidence revealed that although claimant had conducted a job search her efforts were unsuccessful and she remained unemployed.

Under the *Casco* analysis the calculation of claimant's benefits begins with a determination of whether the claimant has suffered a permanent total disability. And because in this case the claimant has suffered permanent impairment to both upper extremities there is a presumption of permanent total disability. If the Board were to proceed with the *Casco* analysis it would address issues that were not contemplated or litigated by either party or considered by the ALJ.

Consequently, the Board finds that *in the interests of justice*⁴ this matter should be remanded to the ALJ who is directed to reopen the record and allow the parties the opportunity to fully consider and address the implications of K.S.A. 44-510c and *Casco*.

AWARD

WHEREFORE, it is the decision of the Board that this matter is remanded to Administrative Law Judge Brad E. Avery for further proceedings consistent with the Court of Appeals mandate and the Board's Order as set forth above.

IT IS SO ORDERED.

³ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508 at Syl ¶ 7-9.

⁴ *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

Dated this _____ day of February 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Patricia A. Wohlford, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge